



Orphaned by Design – Part 3

The last two essays discussed the question of extracting sperm from a *Meis* to impregnate his widow and focused on the Halachic issues concerning the extraction of the sperm and whether the deceased fulfills the Mitzva of procreation in this manner. This essay will discuss the extent to which the child is considered to be the offspring of the *Meis* and whether the mother is thereby exempted from *Yibum*.

For the sake of discussion, we will utilize the following scenario: Reuven dies without children, leaving his widow in need of either *Yibum* or *Chalitza*. His only brother is a minor, thus the widow must wait many long years until he can perform *Chalitza* and permit her to remarry. A potential solution could be to extract sperm from the deceased husband and use it to conceive a child, thereby exempting his wife from *Chalitza*. Would this be a valid solution?

Clearly, if the child would not be considered the son of the deceased, his widow would not be exempt from *Yibum*. However, even if the child is considered the son of the deceased, it would not necessarily follow that the widow would be exempt from *Yibum*, as we will explain.

The *Noda b'Yehuda* (*Kama*, E.H. 69) discusses the Halacha that if a widow was pregnant at the time of her (childless) husband's death, the child that is born exempts the widow from *Yibum* or *Chalitza* (*Yevamos* 87b). Although the husband never merited a child in his lifetime, now – after his death – he has a child. All agree that this son is attributed to him, as Rashi comments, "*Thus, [the verse:] 'And he does not have a child' refers to the time of his death – and [in this case] he has [a child].*"

The *Noda b'Yehuda* contends that if the widow had not been pregnant at the time of her husband's death, she would not have been absolved from *Yibum* by "*a pregnancy that she conceived afterwards*". He explains:

If that is the case, I maintain that a woman who did not conceive...before her husband's death; although she conceived after his death – and the child is his son in every sense –with regard to Yibum, the Pasuk, "And he has no child" applies at the moment of his death, and she is therefore bound to performing Yibum.

In other words, if a man and woman had engaged in intercourse, but the man died before conception occurred; although the child is considered the son of his deceased father in every sense, he does not exempt his mother from *Yibum*. The instant that determines whether, upon the father's death, "*He has a child*" or "*He does not have a child*", is the moment of fertilization that commences the pregnancy. Thus, as long as the pregnancy has not commenced before her husband died, she is still bound to *Yibum*.

Thus, according to the *Noda b'Yehuda*, the obligation of *Yibum* does not depend on whether the deceased husband actually has a child, but on whether he is considered to have had a child during his lifetime. Apparently, in his view, although a child conceived after his death is considered **his child**, he was never **its father**.

The *Chidush* of the *Noda b'Yehuda* is that the Torah implies that the purpose of *Yibum* is to ensure that the deceased has offspring who will carry on his name.¹ Surely, there is no better way to establish descendants on behalf of the deceased than a child who is his actual son! Is this objective fulfilled to a lesser degree in this situation than by means of a child born to the deceased's brother? The child that the brother bears will not live in the deceased's lifetime either! It is therefore clear – as the *Acharonim* explain in *Maseches Yevamos* – that the Torah establishes the brother of the deceased in his stead, and *Yibum* is a continuation of his brother's marriage. The *Noda b'Yehuda* therefore maintains that a child born from a living father who represents the deceased cannot be compared to a child conceived by his mother only after his father's passing – in which case he was never practically a father, despite that the child is considered his son.

This *Chidush* gives rise to many difficulties. R' Tzvi Ryzman *shlit"a* cites several *Acharonim* who challenge this ruling of the *Noda B'Yehuda* (*Sefer Ratz kaTzvi – Inyanei Even haEzer*):

The *Keren Ora* questions how it could be possible for the deceased husband to have a son who inherits him, yet his brother would still perform *Yibum* to his wife (generally, the brother who performs *Yibum* inherits the deceased). His view is that “*Anyone who will eventually have children – or who had children who then died – [his widow] is not bound to Yibum*”.

Rav Shlomo Zalman Auerbach *zt"l* (*No'am* 1, page 150) points out that if we were to accept the view of the *Noda b'Yehuda*, an additional *Chidush* would result with regard to *Mamzerim*: If a married woman had relations with another man, and her husband died before she conceived, according to the *Noda B'Yehuda*, the child would not be a *Mamzer*. Although the child would be the son of the adulterer – who had relations with the woman while she was still married – she was not married at the time of conception (and the act of intercourse alone is not sufficient to make the child a *Mamzer*).

Rav Shlomo Zalman concludes:

It therefore appears that when a person engages in intercourse with his wife; as soon as the sperm enters her body – at which point no further action is required [to facilitate conception] – it is considered the onset of pregnancy. Even if conception only occurs several days later, we follow the moment of intercourse – both for stringency and leniency. Moreover, even if she was inseminated while bathing or through artificial insemination, it appears that we follow the moment

¹ See Devarim 25:6.

the sperm enters her body, since conception then follows spontaneously without any further action.

Rav Shlomo Zalman thus disagrees with the position of the *Noda b'Yehuda* who rules that we follow the time of fertilization. He maintains that determining factor is the insemination, after which point no further action is required. Although the sperm has not yet effected fertilization, the pregnancy is considered to have commenced. Therefore, in the case of the *Noda b'Yehuda* – where insemination occurred through intercourse before the husband's death, the widow would be exempt from *Yibum*. Furthermore, even in a case of artificial insemination; provided that it had taken place before the husband's death, the widow would be exempt from *Yibum* – even if the husband died before fertilization.

However, if the artificial insemination occurred only after the husband's passing, his wife would require *Yibum*. Although the child would be considered the son of the deceased, the pregnancy had not commenced at the time of his death, for the act of insemination had not yet occurred (as opposed to the case of intercourse).

In light of Rav Shlomo Zalman's ruling, some Poskim raise the following dilemma. If an embryo is conceived by means of IVF, after which the husband – who had provided the sperm – passes away, should the fertilized embryo be then implanted into the widow's womb? On the one hand, since the embryo has already been conceived, the pregnancy would be considered to have commenced – although it has not yet been returned to the womb. On the other hand, this cannot be considered a state which requires no further action, since the embryo has not been implanted in the womb. If so, perhaps Rav Shlomo Zalman would agree in this case that the pregnancy has not commenced.²

We discussed a related question in an essay about abortion. We explained that although gentiles are sentenced to death for killing a fetus, this would not apply to an in-vitro embryo, for it would not be considered "*One who spills the blood of a person – that is inside a person*", from which Rabbi Yishmael derives: "**Who is a person that is inside a person – a fetus inside its mother.**" This *Pasuk* indicates that a fetus is only recognized as a fetus when inside its mother.

In our case, there is an added *Chidush* in that the child is born to a deceased parent - the sperm used was that of a *Meis*. Rav Moshe Sternbuch *Shlit"a* (*Teshuvos v'Hanhagos* 6:244) therefore raises the question: "*Perhaps the classifications that the Torah gives a person – such as father or mother, Jew or non-Jew – are only applicable when the person is alive in a body.*"

² Rav Shlomo Zalman established an important principle that subsequently became the focal point of a great Halachic controversy: Is a child born through artificial insemination related to the sperm donor? This question cast a big shadow over the entirety of fertility treatment, and later to that of IVF. We should mention that most Poskim maintain that the child is considered to be related to his father – who provided the sperm. We will not elaborate on this question in this essay.

We should stress that Rav Sternbuch's argument only applies to the sperm of a deceased person – not to artificial insemination where the sperm donor is alive. Rav Sternbuch concluded that extracting sperm from a deceased person – or using frozen sperm of a deceased person to beget children from his widow – should be viewed negatively, since there is a doubt as to the relationship between the child and the sperm-provider.

To conclude, let us cite several points from an essay of *HaGaon* Rav Asher Weiss *Shlit"a* on this general topic.

First, in a case where a man expressed before his death that he wants sperm to be extracted from him – or that his frozen sperm should be used, some consider it a Mitzva to do so, given that *"It is a Mitzva to fulfill the wishes of the deceased."* Rav Asher, however, disagreed, arguing that this Halacha only applies to instructions pertaining to his material possessions.

Second, with regard to a bachelor who requests that his sperm be used after his death to beget a child from an unmarried woman, there are many concerns. Presumably, the mother would not be Torah-observant, in which case, it is difficult to imagine that he would receive much satisfaction from a child raised to live a secular life. Further, acting in this way is liable to legitimize an abnormal family setting, without the healthy structure of father, mother, and children.

(Whether this factor would apply to using the sperm of a husband after his death to impregnate his widow with his child is open to debate. On the one hand, it would be a pregnancy of a single woman. On the other hand, since it would be the son of her husband, it would not necessarily legitimize out-of-wedlock pregnancy.)

Therefore, Rav Asher maintains that acting this way can cause "severe damage". Even if this was the wish of the deceased, *"It is clear that it is fundamentally flawed."*

He further cites the statement of *"One Gaon"* (referring Rav Zalman Nechemia Goldberg zt"l – Asya 65-66), who wrote in this regard: *"The Torah grants great importance to man's desire to leave a name and memory in the world"*, as may be derived from the *Parsha* of *Yibum*. In response Rav Asher writes:

I do not understand; was the Mitzva of Yibum given because of "man's desire"? May we expound on the reasoning of the Torah? Surely, its source is in the loftiest realms, and it is a Divine decree. "The reasons of the Mitzvos were never revealed to any person" (Nefesh haChaim, end of Sha'ar 1), especially this Mitzva, about which the holy Zohar states that it contains lofty secrets.

The Halachic discussion of this topic has not been fully completed – we have yet to merit detailed *Teshuvos* from the *Gedolei haPoskim* on this weighty matter. On the one hand, we clearly understand the innate desire of the deceased to have continuity in the world. We also understand the desire of the widow – or the parents – for the deceased to have an enduring legacy. However, we must contend with grave concerns;

both from a Halachic perspective – such as the disgrace of a *Meis* and deriving benefit from it – and ethical concerns, some of which we have not mentioned in this short series of essays, but should not be underestimated: To what extent should we consider the difficulty and pain of a child who was orphaned by design? Is such conduct considered inappropriate involvement with the actions of the Creator?

We do not have the ability to render a ruling on these difficult issues. We have only attempted to present the main considerations, and the decision(s) must be left to *Gedolei Yisrael*.